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Kuan Kong Hong v Ng Kim Cheong & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-317–02 of 2022
HAS ZANAH MEHAT, CHE MOHD RUZIMA AND AZIMAH OMAR JJCA
26 JULY 2023

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Contract — Breach — Contract for sale of accountant's business ('agreement') — Whether accountant breached non-competition clause in agreement by causing clients of buyer of her firm to abandon buyer and engage services of new auditors and tax agents known to her — Whether evidence was overwhelming that accountant had caused the clients to make the switch

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The appellant accountant ('Kuan'), who had been practising as an auditor and tax agent in her own firm for about 27 years, decided to sell her practice to the first respondent ('Ng'). The sale involved Ng taking over Kuan's existing clients and continuing to service them. To ensure that her clients would be comfortable with the change-over, Kuan suggested a 'succession plan' in which she would continue to work in Ng's new firm for the short term to assure clients and staff of her 'presence and continuity'. In furtherance of that plan, Kuan's firm was changed to a limited liability partnership ('LLP') bearing the name KCSM KUAN PLT. Kuan and Ng subsequently signed a sale agreement under which: (a) Ng agreed to pay Kuan RM980,000 to buy over the entire LLP; (b) pending the full payment of the purchase price, Kuan would remain as a monthly salaried partner in the LLP; and (c) Kuan agreed not to compete or cause any competition against the respondents in any capacity for five years after the sale agreement was completed. Trouble started when Kuan's association with the LLP ended when Ng fully paid up the purchase price under the sale agreement. On leaving the LLP, Kuan was employed by a company secretary firm which shared the same building with an auditing and tax agent firm ('the competing firm') that was owned by Kuan's former employees and long-time friends. Ng discovered that almost immediately after leaving the LLP, Kuan had become the company secretary for 30 of his long-time corporate clients and that she had introduced them to the competing firm to avail of their auditing and tax management work. The 30 companies concerned convened respective extraordinary general meetings (which were attended by Kuan as their company secretary) to remove the LLP as their auditor and to appoint the competing firm as their new auditor. After hiring a private investigator to gather evidence, including photographs, of Kuan's activities against the LLP, Ng sued Kuan for breach of the sale agreement. The High Court allowed Ng's claim on finding that there was clear evidence that

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Kuan had caused the 30 corporate clients of the LLP to abandon the LLP and shift their allegiance to the competing firm. In Ng's suit, Kuan counterclaimed against the respondents for defamation and breach of confidentiality but the trial court dismissed the counterclaim. The instant appeal was against the High Court's decision.

Held, unanimously affirming the High Court's finding of liability against Kuan and its dismissal of Kuan's counterclaim and ordering the matter to be remitted back to the High Court to assess the loss of profits suffered by Ng (instead of the LLP's overall loss of income or revenue) as a result of Kuan's breach of contract:

(1) Kuan literally read cl 8.1 of the sale agreement to argue that nothing in it barred her from wooing the respondents' clients away from the LLP. The court would, however, interpret the clause in a business sense in line with the commercial purpose of the sale agreement and succession plan which could only logically mean that the purchase of Kuan's firm meant that the LLP would also retain and continue to afford its services to the firm's existing clientele. Kuan covenanted to sell her entire firm as a going concern with its existing clientele. It was preposterous and absurd of her to contend that the sale agreement did not include the firm's clientele and that she was not barred from inducing clients of her firm or the LLP to move to the competing firm. If she could do that, she would be in breach of the non-competition clause in the sale agreement. The High Court judge was therefore correct in finding that cl 8.1 of the sale agreement included a restriction on Kuan against wooing away the firm's or the LLP's clients and that there was an obligation to ensure that the firm's clients were handed over and maintained by the LLP as the successor (see paras 21–22, 26, 30–32 & 35).

(2) By her actions in causing the 30 corporate clients of the LLP to move to the competing firm, Kuan had clearly breached the non-competition clause in the sale agreement. Even without the evidence of the private investigator and his surveillance report, the evidence (and admissions) of the partners of the competing firm and other documentary evidence of the extraordinary general meetings of the 30 former corporate clients of the LLP was sufficient for Ng to have proven his case against Kuan for breach of the sale agreement (see paras 36–44 & 47).

(3) The High Court judge erred in equating the quantum of Ng's loss to the LLP's loss of fees from losing the 30 corporate clients. Even if the fees payable to the LLP was made a yardstick to measure damages, the judge had failed to consider that partnership income or revenue did not necessarily translate to partnership profit. The gross income or revenue of the LLP had to be deducted with a reasonable and foreseeable amount of

operational expenses before the final net profit amount could trickle down into the partnership's profit (see paras 55–56).

(4) Since no evidence was adduced to assist the court to ascertain the LLP's expenses and deductibles in order to ascertain the profits, the matter had to be remitted back to the High Court to specifically assess the damages in the form of Ng's loss of profits (instead of the LLP's overall loss of income or revenue) caused by Kuan's breach of contract (see paras 58–59 & 64).

(5) Given that Ng's various allegations against Kuan in his suit were proven to be true, there was no merit in Kuan's counterclaim for defamation and the same was rightly dismissed by the trial court. As for Kuan's claim for breach of confidentiality, considering that Kuan herself had her hands tainted by her own breaches of the sale agreement by her abuse of the firm's internal information, portfolio and database, Kuan had not come with clean hands and the court would not lend a hand to her hypocrisy (see paras 60–61).

[Bahasa Malaysia summary

Akauntan perayu ('Kuan'), yang telah beramal sebagai juruaudit dan ejen cukai di firmanya sendiri selama kira-kira 27 tahun, mengambil keputusan untuk menjual amalannya kepada responden pertama ('Ng'). Penjualan tersebut melibatkan Ng mengambil alih pelanggan sedia ada Kuan dan meneruskan perkhidmatan kepada mereka. Untuk memastikan pelanggannya selesa dengan pertukaran tersebut, Kuan mencadangkan 'pelan penggantian' di mana beliau akan terus bekerja di firma baharu Ng untuk jangka pendek bagi menjamin pelanggan dan kakitangan terhadap 'kehadiran dan kesinambungan' beliau. Bagi meneruskan rancangan tersebut, firma Kuan telah ditukar kepada perkongsian liabiliti terhad ('PLT') dengan nama KCSM KUAN PLT. Kuan dan Ng kemudiannya menandatangani perjanjian penjualan di mana: (a) Ng bersetuju membayar Kuan RM980,000 untuk membeli keseluruhan PLT; (b) sementara menunggu pembayaran penuh harga belian, Kuan akan kekal sebagai rakan kongsi bergaji bulanan dalam PLT; dan (c) Kuan bersetuju untuk tidak bersaing atau menyebabkan sebarang persaingan terhadap responden dalam apa-apa kapasiti selama lima tahun selepas perjanjian penjualan disempurnakan. Masalah timbul apabila perjanjian Kuan dengan PLT berakhir apabila Ng membayar sepenuhnya harga belian di bawah perjanjian jualan. Apabila meninggalkan PLT, Kuan telah bekerja dengan firma setiausaha syarikat yang berkongsi bangunan yang sama dengan firma ejen pengauditan dan cukai ('firma pesaing') yang dimiliki oleh bekas pekerja dan rakan lama Kuan. Ng mendapati bahawa hampir serta-merta selepas meninggalkan PLT, Kuan telah menjadi setiausaha syarikat untuk 30 pelanggan korporatnya yang lama dan beliau telah memperkenalkan mereka kepada firma pesaing untuk memanfaatkan kerja pengauditan dan pengurusan cukai mereka. 30 syarikat berkenaan telah mengadakan mesyuarat agung luar biasa masing-masing (yang

dihadiri oleh Kuan sebagai setiausaha syarikat mereka) untuk mengeluarkan PLT sebagai juruaudit mereka dan melantik firma pesaing sebagai juruaudit baharu mereka. Selepas melantik penyiasat persendirian untuk mengumpul bukti, termasuk gambar, aktiviti Kuan terhadap PLT, Ng menyaman Kuan kerana melanggar perjanjian penjualan. Mahkamah Tinggi membenarkan tuntutan Ng apabila mendapati terdapat bukti jelas bahawa Kuan telah menyebabkan 30 pelanggan korporat PLT meninggalkan PLT dan beralih kepada firma pesaing. Dalam saman Ng, Kuan menuntut balas terhadap responden kerana memfitnah dan melanggar kerahsiaan tetapi mahkamah perbicaraan menolak tuntutan balas tersebut. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara mengesahkan dapatan liabiliti Mahkamah Tinggi terhadap Kuan dan menolak tuntutan balas Kuan dan memerintahkan perkara tersebut dikembalikan semula ke Mahkamah Tinggi untuk menaksir kehilangan keuntungan yang dialami Ng (bukannya kehilangan keseluruhan pendapatan atau hasil PLT) akibat daripada pelanggaran kontrak Kuan:

(1) Kuan secara literal membaca klausa 8.1 perjanjian jualan untuk berhujah bahawa tiada apa pun di dalamnya yang menghalangnya daripada memikat pelanggan responden daripada PLT. Walau bagaimanapun, mahkamah akan mentafsir klausa tersebut dalam pengertian perniagaan selaras dengan tujuan komersial perjanjian penjualan dan pelan penggantian yang hanya boleh bermakna secara logik bahawa pembelian firma Kuan bermakna bahawa PLT juga akan mengekalkan dan terus memberikan perkhidmatannya kepada pelanggan sedia ada firma. Kuan berjanji untuk menjual keseluruhan firmanya sebagai usaha berterusan dengan pelanggan sedia ada. Ia adalah tidak wajar dan tidak masuk akal baginya untuk berhujah bahawa perjanjian penjualan tersebut tidak termasuk pelanggan firma dan bahawa beliau tidak dihalang daripada mendorong pelanggan firmanya atau PLT untuk bertukar ke firma pesaing. Jika beliau boleh berbuat demikian, beliau akan melanggar klausa tiada persaingan dalam perjanjian penjualan. Oleh itu, hakim Mahkamah Tinggi adalah betul dalam mendapati bahawa klausa 8.1 perjanjian penjualan termasuk sekatan ke atas Kuan dalam memikat pelanggan firma atau PLT dan bahawa terdapat kewajipan untuk memastikan pelanggan firma tersebut diserahkan dan dikekalkan oleh PLT sebagai pengganti (lihat perenggan 21–22, 26, 30–32 & 35).

(2) Dengan tindakannya menyebabkan 30 pelanggan korporat PLT berpindah ke firma pesaing, Kuan jelas telah melanggar klausa tiada persaingan dalam perjanjian penjualan. Walaupun tanpa bukti penyiasat persendirian dan laporan pemerhatiannya, keterangan (dan pengakuan) rakan kongsi firma pesaing dan keterangan dokumentari lain mengenai mesyuarat agung luar biasa 30 bekas pelanggan korporat PLT adalah mencukupi untuk Ng dalam membuktikan kesnya terhadap Kuan

kerana melanggar perjanjian penjualan (lihat perenggan 36–44 & 47).

(3) Hakim Mahkamah Tinggi terkhilaf dalam menyamakan kuantum kerugian Ng dengan kehilangan fi PLT daripada kehilangan 30 pelanggan korporat. Walaupun fi yang perlu dibayar kepada PLT dijadikan kayu pengukur untuk mengukur ganti rugi, hakim telah gagal untuk mengambilkira bahawa pendapatan perkongsian atau hasil tidak semestinya diterjemahkan kepada keuntungan perkongsian. Pendapatan kasar atau hasil PLT terpaksa ditolak dengan amaun perbelanjaan operasi yang munasabah dan boleh dijangka sebelum amaun untung bersih akhir boleh masuk ke dalam keuntungan perkongsian (lihat perenggan 55–56).

(4) Memandangkan tiada keterangan dikemukakan untuk membantu mahkamah untuk memastikan perbelanjaan dan penolakan PLT untuk memastikan keuntungan, perkara tersebut perlu dihantar semula ke Mahkamah Tinggi untuk menaksir secara khusus ganti rugi dalam bentuk kehilangan keuntungan Ng (bukannya kerugian keseluruhan pendapatan atau hasil PLT) yang disebabkan oleh pelanggaran kontrak Kuan (lihat perenggan 58–59 & 64).

(5) Memandangkan pelbagai dakwaan Ng terhadap Kuan dalam samannya terbukti benar, tiada merit dalam tuntutan balas Kuan untuk fitnah dan perkara yang sama telah ditolak oleh mahkamah perbicaraan. Bagi tuntutan Kuan untuk pelanggaran kerahsiaan, memandangkan Kuan sendiri telah dicemari oleh pelanggaran perjanjian penjualannya sendiri dengan penyalahgunaan maklumat dalaman, portfolio dan pangkalan data firma, Kuan tidak datang dengan tangan yang bersih dan mahkamah tidak akan membantunya dalam penipuannya sendiri (lihat perenggan 60–61).]

Cases referred to

Bon Chong Hing @ Chong Hing & Anor v Gama Trading Co (Hong Kong) Ltd [2011] 4 MLJ 52; [2011] 6 CLJ 493, CA (folld)

Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Anor [2014] 3 MLJ 892, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)

Prenn v Simmonds [1971] 3 All ER 237, HL (folld)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (folld)

Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770, FC (folld)

Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546, CA (refd)

TM Global Marine Sdn Bhd (formerly known as Smart Work Co-Ordinating Sdn Bhd) v Thermatek Sdn Bhd [2022] 9 MLJ 641, HC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103, 114(g)
Limited Liability Partnerships Act 2012 s 3

Appeal from: Civil No WA-22NCVC-408–06 of 2019 (High Court, Kuala Lumpur)

Koh Yew Chong (with Muhammad Izzat bin Zainal) (Lee & Koh) for the appellant.
Michael Choo Min Fook (with Phung Zhu Yen Grace) (Michael Choo & Partners) for the respondent.

Azimah Omar JCA:

THE BACKGROUND FACTS

[1] The appeal before us concerns the respondent-plaintiff's claim against the appellant-defendant for breach of contract which codified the parties' mutual intention to pursue a 'succession plan' in which the respondent had agreed to purchase and receive, while the appellant had agreed to sell and handover the entirety of the appellant's auditing firm (inclusive of and not limited to the firm's business, assets, goodwill and most pertinently the firm's already-existing clientele).

[2] The respondent essentially alleged that the appellant had acted in breach of the terms of the contract and contrary to the true intention and spirit of the 'succession plan' by enticing or siphoning some 30 clients (now former clients) of the respondent to be 'parked' at another firm of auditors which had been admitted to be owned by the appellant's long-time acquaintance and former employees. The fact of the appellant's involvement in brokering or introducing the respondent's 30 clients to the new firm of auditors were explicitly admitted by a partner of the new auditing firm (who was subpoenaed by the respondent).

[3] After seven days of full trial, the learned High Court judge ('learned judge') had allowed the respondent's claim and found that indeed the appellant had exerted her influence upon the 30 clients which led the 30 clients to remove the respondent as their auditor and tax agent.

[4] Dissatisfied with the decision, the appellant thereafter appealed against the learned judge's decision to the Court of Appeal. The parties shall be referred to in their capacities as they were at the High Court.

[5] For a better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the present appeal. Kuan Kong Hong ('Judy') ('the defendant/the appellant/Judy') was a certified accountant who had practiced as an auditor and tax agent as well as the sole proprietor of an auditing and tax agent firm by the name of KH KUAN CO ('the firm') since 12 December 1986.

[6] After approximately 27 years of practicing under the firm, the defendant was desirous to retire and to sell the firm. The defendant's friend, one Josephine, had learned of the defendant's intention to sell the firm. In view of the defendant's intention to sell the firm, Josephine had introduced Ng Kim Cheong ('the plaintiff/the respondent') to the defendant as a potential purchaser of the firm. Thereafter on 2 April 2013, the plaintiff and the defendant had met to discuss the notion of the plaintiff's purchase of the defendant's firm.

[7] Following the meeting, the parties continued correspondence via a series of emails. The entire correspondence between the parties revolves around the matter which the parties mutually refer to as the 'succession plan' in which both parties mutually seek to discuss terms so as to realise the mutual pursuit of the firm's continuity to serve the existing clientele even after the succession of the firm from the defendant to the plaintiff ('the succession plan').

[8] The first reference to the succession plan was made by the defendant herself in her email dated 11 April 2013 whereby the defendant coined the term '... my succession plan!'. The defendant's own admission of intent to maintain the firm's clientele post-succession was plainly admitted by the defendant via her own email to the plaintiff dated 9 May 2013 where the defendant intimated the following:

> ... among the information that you will required of me — can you give me an indication of how u wish to go about this *SUCCESSION PLANNING* and what RM figure can I expect?
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> ...
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> ... but as I am the company and we both agreed that I need to be around for a while *to ASSURE CLIENTS and staff of my presence AND CONTINUITY — be rest assure of MY COMMITMENT ON THIS SUCCESSION PLANNING*.

[9] In reliance of the parties' mutual pursuit of the succession plan, the plaintiff agreed to purchase the defendant's firm. Before the terms of purchase

were codified in writing, the succession plan already began to take place through numerous preliminary handovers.

[10] On 1 April 2015, the plaintiff began to take over and review all of the clients' files of the firm. The plaintiff also began to undertake management and administration of the firm as well as the firm's overheads. In furtherance of the succession plan, the firm was changed to become a limited liability partnership by the name of KCSM KUAN PLT ('the LLP') on 14 April 2015.

[11] To solidify the succession plan (which was already underway), both the plaintiff and defendant entered into a partnership interest sale agreement dated 28 July 2015 ('sale agreement'). Salient terms of which are as follows:

(a) the plaintiff agrees to pay the purchase price of RM980,000 to the defendant for the purchase and succession of the entire LLP (cl 3.1);

(b) to assure and maintain the existing clients, the defendant may remain as a salaried partner in the LLP commencing from the backdated date of 1 April 2015 (cl 2.3);

(c) the defendant as salaried partner will be paid RM12,000 per month during her tenure as salaried partner until full payment of the purchase price by the plaintiff (cl 4.3); and

(d) the defendant agreed to a non-competition for the duration of five years after the completion of the sale agreement ('restricted period') to not compete or cause any competition against the plaintiff IN ANY CAPACITY.

[12] For about three years since the sale agreement (during the tenure of the defendant as salaried partner) the LLP's business proceeded seamlessly with the LLP's existing clientele (since the firm's time) was maintained without the LLP losing any of its clientele. However, trouble began to brew when the defendant's salaried partnership ended due to the completion of the sale agreement.

[13] On *10 December 2018*, the plaintiff fully paid the purchase price to the defendant. And as per the mutually agreed cl 4.3 of the sale agreement, the defendant shall fully relinquish her position and interest in the LLP and retire from the LLP.

[14] The defendant's retirement and full relinquishment of her interest in the LLP should have been the end of all matters. But the series of revelations the plaintiff later discovered only proved the beginning of the defendant's scheme to abuse the information and resources she was formerly privy to as the LLP's

salaried partner ('defendant's scheme'). The following was, inter alia, discovered by the plaintiff post the defendant's departure from the LLP: A

(a) not even two months after the defendant's departure, the defendant was immediately employed at Pro Venture Corporate Services Sdn Bhd ('Pro Venture'), a company secretary firm which intriguingly shared the same building with a competing Auditing and Tax Agent firms (owned by the defendant's former employees and long-time acquaintance) which curiously later siphoned 30 of the plaintiff's long-time clients; B

(b) unbeknownst to the plaintiff, the defendant had also wedged herself into 30 of the plaintiff's clients ('the 30 companies/30 clients') to become these 30 companies' new company secretary immediately after leaving the LLP; C

(c) to complete the defendant's scheme, it was readily admitted by one of the subpoenaed partners of CHI-LLTC ('the competing firm') Lam Foong Kei ('SP4'), that the defendant brokered or introduced the 30 companies to the competing firm and Archer Tax Services Sdn Bhd to undertake the auditing and tax management of these companies away from the LLP; D

(d) following the defendant's 'brokerage' and introduction, the competing firm began to issue numerous letters to the plaintiff seeking the LLP's consent to undertake the auditing of 30 of the LLP's existing clients. In response, the plaintiff rightfully refuses consent and informed the competing firm of the predicament surrounding the defendant's scheme in breach of cl 8.1 of the sale agreement; E F

(e) upon the LLP's refusal to accede to the competing firm's request, it was later discovered that these 30 companies convened their respective extraordinary general meetings ('EGMs'). The minutes of all these EGMs share the following traits: G

(i) the defendant became the 30 companies' newly appointed company secretary;

(ii) the defendant attended the EGMs as the 30 companies' newly appointed company secretary; and H

(iii) for all the 30 companies which the defendant was appointed as the new company secretary (and attended the EGMs as the new company secretary) ALL THE 30 COMPANIES DECIDED TO REMOVE THE LLP AS THEIR AUDITOR AND TO APPOINT THE COMPETING FIRM INSTEAD. I

[15] Alarmed by the peculiar turn of events since the defendant's departure from the LLP, the plaintiff had hired a private investigator to investigate the defendant's conducts post her retirement from the LLP.

[16] During the term of investigation, it was discovered that the defendant maintained close communications with the LLP's clients even after the defendant's retirement. The defendant was photographed to have met with representatives from five companies which were the LLP's clients. Out of these five companies a resounding majority of three companies followed the defendant's scheme, was introduced and brokered to the competing firm, and later appointed the competing firm as the three companies' new auditors.

[17] In view of all the above disturbing/alarming revelations, the plaintiff commenced an action at the High Court below against the defendant for contractual breach of the sale agreement.

THE HIGH COURT'S FINDINGS

[18] Upon full trial, the High Court had allowed the plaintiff's claim mainly on the following reasons:

(a) there was clear evidence of enticement or siphoning of the LLP's clients considering the fact that:

(i) the same 'regular clients' who appointed the defendant as their new company secretary were the exact same clients who later removed the LLP and appointed the competing firm as their new auditors;

(ii) based on the private investigator's ('SP2') surveillance report, there are photographic evidence of the defendant's constant and continued communication and meetings with the LLP's clients even after the defendant's retirement;

(iii) it cannot be mere coincidence that for all the EGMs which the defendant had attended as the clients' new company secretary, these clients all decided to abandon the LLP and instead appoint the competing firm (who was introduced and brokered by the defendant); and

(iv) it was clear to the learned judge that the defendant had exerted her influence to lead these 30 clients to abandon the LLP and opt for the competing firm instead (upon her brokerage and introduction).

THE APPEAL BEFORE US

[19] Dissatisfied with the learned judge's decision, the defendant appealed against the decision to the Court of Appeal. The defendant's appeal is primarily leveraged on the following grounds:

(a) even if there was any influence exerted by the defendant, the plain words in cl 8.1 of the sale agreement allegedly never contained any stipulation

regarding maintaining current clientele, or restriction against enticement of clients away from the LLP;

(b) an adverse inference should be drawn against the plaintiff for failing to call representatives from the 30 companies to testify regarding the plaintiff's allegation of enticement;

(c) the defendant's employment at Pro Venture is entirely distinct and unrelated to the competing firm. The eventual appointment of the competing firm has nothing to do with the defendant;

(d) there was nothing wrong for the defendant to be appointed as the 30 client's new company secretary and to attend the EGMs removing the LLP as the 30 clients' auditor;

(e) the 30 companies' EGMs were convened not because of the defendant's influence. Instead they were necessitated due to the plaintiff's refusal to resign as the 30 companies' auditor;

(f) SP2 surveillance report was incomplete and self-serving as they only contain photographic evidence of meetings and never any evidence as to the contents of the meetings; and

(g) the plaintiff has no locus standi to claim for losses allegedly suffered by the LLP as the LLP is a separate legal entity under s 3 of the Limited Liability Partnerships Act 2012.

[20] We have perused the learned judge's grounds of judgment, both parties' written submissions, as well as the appellant's memorandum of appeal and found that the appeal before us can be determined by answering the following issues:

(a) Issue 1: Whether or not the mutually anticipated succession plan and cl 8.1 of the sale agreement also includes a restriction against enticement or the obligation to ensure that the firm's clientele be handed over and maintained by the LLP as successor;

(b) Issue 2: Whether the learned judge was correct in finding that the defendant indeed had breached the sale agreement;

(c) Issue 3: Whether the learned judge was correct in not drawing any adverse inference against the plaintiff for allegedly failing to call material witnesses to testify at trial;

(d) Issue 4: Whether the learned judge was correct in using the LLP's fees as a gauge or measure to quantify the proper quantum of damages for the defendant's breach; and

(e) Issue 5: Whether the learned judge was correct in dismissing the defendant's counterclaim against the plaintiff.

Issue 1: Whether or not the mutually anticipated succession plan and cl 8.1 of the sale agreement also includes a restriction against enticement or the obligation to ensure that the firm's clientele be handed over and maintained by the LLP as successor

[21] One of the defendant's chief contentions was that even if the defendant had caused the 30 clients to remove the plaintiff as their auditor, the defendant was still not in breach of cl 8.1 of the sale agreement because cl 8.1 literally does not contain any restriction against enticement away from the LLP.

[22] The defendant contended that the plain words contained within cl 8.1 does not stipulate any covenant restricting the defendant from taking clients away from the plaintiff and instead only restricts the defendant from engaging in or be financially interested in any other business which would be in competition with the plaintiff. In essence, the defendant contended the four corners rule of construction of contracts in that the court cannot go beyond the plain meaning of the words expressly stated in the contract to determine the parties' obligations under a contract (see *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546; *Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Anor* [2014] 3 MLJ 892).

[23] It is only apt that we refer to and reproduce the staunchly litigated cl 8.1 of the sale agreement here:

> 8.1 Upon Completion of the Agreement, the Vendor irrevocably and unconditionally undertake to and with the Purchaser that it shall not, within the states of Selangor, Perak, Pahang and Negeri Sembilan and/or and part therein, in any Relevant Capacity during the Restriced Period, other than practicing under the Partnership, whether directly or indirectly:
>
> (i) carry on, be engaged in or be econimically interested in any other business which is of the same or similar type to the business of the Partnership and which is or is likely to be in competition with any part of the business of the Partnership;
>
> (ii) induce or seek to induce or solicit any employee from the senior management of the Partnership to become employed whether as the employee, consultant or the otherwise by the Partnership of the Vendor, whether or not such employee would thereby commit a breach of contract of service. The placing of an advertisement of a post available to a member of the public generally or the recruitment of a person through an emplomet agency shall not constiture a breach of this clause provided that neither the Vendor not any of its related companies encourages or advises such an agency to approach any such employee; or

(iii) use any trade name which is, or was at any time during the previous (12) months used by the Partnership or use any other name intended or likely to be confused with any such trade name.

[24] We are well aware that cl 8.1 indeed does not specifically mention of any restrictions as to the firm's clients. Nor are we attempting to challenge the many precedents which have upheld the four corners rule of the interpretation of contracts. Indeed, as a general rule, the courts ought not to disturb party autonomy, improve bargains, or alter a contract beyond the literal words contained within the four corners of any contract. However, the four corners rule is not the be all and end all rule in interpreting any contract. This general rule is definitely neither absolute nor it is without exceptions. This general rule must also be considered in tandem with other equally salient rules of interpretation. Some exceptions even apply against contractual terms which are clear and unambiguous. One exception being, the business and commercial sense approach of constructing or interpreting a contract.

[25] This rule of contractual interpretation was first propounded by the House of Lords in the landmark case of *Prenn v Simmonds* [1971] 3 All ER 237. The House of Lords propounded that:

(a) even at the face of a clear term or wording of a clause (and there are two competing interpretations of the same term or wording), *the court must prefer the interpretation which makes 'commercial good sense'*:

> *In the light of the aim of the agreement*, and even on a purely linguistic construction, the references to 'profits' in paras (a) and (b) were to the consolidated profits of the group and not to the profits of the holding company, RTT Ltd, only; furthermore, *this construction was in accordance with commercial good sense …*;

(b) even if the terms of a clause is clear and unambiguous, *the court can still look beyond mere linguistic and literal considerations and look into the 'genesis' of the transaction (surrounding circumstances)* as to conclude an interpretation which makes good business sense:

> In order for the agreement of 6 July 1960 to be understood, it must be placed in its context. *The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.*
>
> …
>
> Surrounding circumstances may, he says, 'stamp upon a contract a popular or looser meaning' than the strict legal meaning, *certainly when to follow the latter would make the transaction futile.* (Emphasis added.)

[26] Succinctly, if there are two competing interpretations of the same term in a contract, the court cannot subscribe to the interpretation that is counterintuitive to the business sense of the transaction, or the interpretation which would make the transaction futile. Instead, the court ought to prefer the other interpretation which makes more business sense in line with the commerce and purpose of the transaction.

[27] The Federal Court in *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770 has upheld the same sentiment:

> *In this case, we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading* and the kind which is actionable in a passing off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word 'competition' used in cl 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of *Antaios Compania Naviera SA v Salen Rederierna* AB:11
>
> *... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.* (Emphasis added.)

[28] More recently, the Federal Court has restated the same principle in the case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 for the courts to prefer the interpretation that makes business common sense in cases where there are two or more competing interpretations:

> Thus, the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v Britton*), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 para 21 that:
>
> > ... if there are two possible constructions, *the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*. (Emphasis added.)

[29] We also found wisdom in the commonwealth decision in the Court of Appeal's decision in *Bon Chong Hing @ Chong Hing & Anor v Gama Trading Co (Hong Kong) Ltd* [2011] 4 MLJ 52; [2011] 6 CLJ 493:

> [35] From all these authorities, the following principles can be discerned. That the task of interpreting a contract requires an objective approach. And the court must determine the objective aim or purpose of the transaction and this is usually done by considering the factual matrix that forms the background to the contract. At the end of the day, the correct test to apply is the test of a reasonable man and this is said to be the stamp of an objective approach as opposed to the subjective view of a party to the contract. *Of course, emphasis is always placed on the words used in the contract*

but where the words used lead to a conclusion that defies business logic, then the contract must be construed in such a way as to make it conform to business logic. (Emphasis added.)

[30] Thus, applying the principles above, we ask the question, what is the genesis, and true commercial purpose of the mutually anticipated succession plan and sale agreement? The true commercial purpose must necessarily be that:

(a) considering the gradual (and not abrupt) retirement of the defendant and the defendant's express intent (as per her emails) to 'assure clients' and maintain 'continuity', the sale agreement and succession plan *must logically also include the succession of not only the staff BUT ALSO THE FIRM 'S EXISTING CLIENTS*; and

(b) considering the mutual understanding and intent to keep the firm's (now LLP's) business a going concern and succeeding, it *is only logical that the plaintiff would expect that the purchase of the firm would also mean that the LLP would keep and maintain its existing clientele.*

[31] The absurdity in the defendant's rigid interpretation is apparent. The defendant covenanted to sell the firm's ENTIRE business as a going concern and to ensure the business to proceed and survive post-succession. If the succession plan were to succeed as mutually agreed, it is imperative that the firm be able to continue to do business with its existing clients even after succession. In fact, it is plain logic that the selling price and value of the firm would have already factored in the profitability of the firm. Thus, the defendant's insistence that the sale agreement does not include the firm's clientele is preposterous and absurd. Such a sale would only leave the plaintiff with an empty husk or shell of a business. Such an interpretation would render cl 8.1 of the sale agreement to be nothing more than a toothless tiger.

[32] It is absurd for the defendant to contend that *cl 8.1 of the sale agreement* only restricts the defendant from engaging in a competing business but does not restrict the defendant from brokering or siphoning clients away from the firm to be 'parked' at the competing firm. Even if it were true that the defendant was entirely unrelated to the competing firm (which we believe she definitely was), *such an interpretation would indirectly defeat the entire genesis of non-competition in that it would allow the defendant to cause competition against the firm albeit by the conduit of another competing firm*.

[33] Borrowing the words of the Federal Court in *Seet Chuan Seng*, the plaintiff (as a reasonable man) would never take leave of his senses and agree to such a term which would leave the LLP's business vulnerable to the defendant's scheme. Thus, the absurd interpretation proposed by the defendant would defy

the very fabric and essence of the succession to be commercially logical and sensible. Thus, we cannot simply stand idly by the literal words in cl 8.1 and just ignore the glaring context and pertinent surrounding circumstances leading up to the sale agreement. We must accordingly yield the interpretation to the more sensible interpretation following the interpretation proposed by the plaintiff.

[34] The true and actual genesis of the sale agreement must have been the continued operations of the business with the existing clients already within the LLP's portfolio. It does not make commercial sense that the plaintiff would agree to purchase the LLP without the intention to preserve the LLP's existing clientele.

[35] Considering all of the above deliberation, we answer *issue 1 in the affirmative*. It was appropriate and correct for the learned judge to find that cl 8.1 of the sale agreement indeed includes a restriction against enticement or the obligation to ensure that the firm's clientele be handed over and maintained by the LLP as the eventual successor.

Issue 2: Whether the learned judge was correct in finding that the defendant indeed had breached the sale agreement

[36] Now, apart from the surveillance report prepared by the private investigator (which we will deal with later in this judgment), we are mindful of the myriads of other evidence and facts which were readily admitted by the defendant herself, the partners of the competing firm, and facts which were proven by means of documentary evidence. Those relevant evidence are, inter alia:

(a) unbeknownst to the plaintiff, the defendant had wedged herself into 30 of the LLP's existing clients to be appointed as the 30 clients' newly appointed company secretary *immediately after her departure from the LLP*;

(b) the same exact 30 clients who had appointed the defendant as their new company secretary *were the exact same 30 companies who later removed the plaintiff as their auditor*;

(c) unbeknownst to the plaintiff, the defendant had attended the EGMs of the same 30 companies;

(d) the same 30 EGMs which the defendant had attended as the 30 clients' new company secretary *happened to be the exact 30 EGMs which led to the removal of the plaintiff as the 30 clients' auditor and the appointment of the competing firm*;

(e) it was readily admitted during trial by a partner of the competing firm

that the person who introduced or brokered the 30 clients to appoint the competing firm was the defendant herself:

(i) SP4 readily testified in his witness statement:

> *Who introduced these clients to CHI LLTC to take over from KCSM?*
>
> Judy introduced.
>
> *Do you know any of these clients personally before you took over?*
>
> No.

(ii) during cross-examination, after much reluctance SP4 finally admitted that the defendant ('Judy') had indeed expressed an intention to 'park' some cases in the competing firm:

> I do not know, until now also I do not know why and my concern very straightforward. Clients come to me, then I can have the ability to accept, do it and just do it. *Then I also do not know why SHE, I MEAN JUDY, WANT TO PARK, I mean so-called the case to us, it's not he, she herself to carry out the works, I would say so, yes.*

(iii) SP5 in his testimony was largely evasive and kept insisting that whatever dealings between the defendant and the competing firm should be asked to SP4 ('Frankie'). Upon being asked about the notion of the defendant wanting to 'park' her clients at the competing firm, SP5 evasively answered that the defendant indeed approached SP4 and had discussed something with SP4 although the discussion was not made known to him. Although not affirming such an arrangement, SP5 also did not deny that SP4 had indeed discussed some 'matters' with the defendant:

> *Did the defendant, Judy Kuan Kong Hong approach you and Frankie to talk about parking her clients at CHI-LLTC?*
>
> She did not approach me.
>
> *Did she approach Frankie?*
>
> *I believe there was some discussion* but it was not made known to me.

(f) it was also readily admitted by SP5 that indeed Pro Venture and the competing firm has history of working together;

(g) it was also admitted by both partners of the competing firm that there was *proximity in location* between Pro Venture and the competing firm in that *both of the companies were neighbours in the same building complex*;

(h) apart from the proximity between Pro Venture and the competing firm, there was also an *admitted decades' long-standing nexus and proximity in relationship between the two partners of the competing firm themselves and the defendant*. It was revealed that both SP4 and SP5 were *FORMER EMPLOYEES OF THE DEFENDANT* and had on and off

communication with the defendant *since between 20 to 30 years ago*:

(i) SP4 readily admitted in his witness statement:

> *Do you know Judy Kuan?*
>
> *YES, SINCE 1999.*
>
> *How do you know her?*
>
> *She was my ex-boss. I worked in KH Kuan in 1999.*
>
> *Do you keep in touch with her after leaving KH Kuan?*
>
> *YES, ON AND OFF.*

(ii) SP5 readily admitted in his witness statement:

> *How do you know the defendant, Judy Kuan Kong Hong?*
>
> She was my former boss. I was an employee of KH Kuan Co.
>
> *How long have you known the defendant?*
>
> Since sometime in 1991.

[37] The defendant is adamant that the eventual siphoning of the 30 clients to the competing firm had nothing to do with her as she was neither employed nor financially interested in the competing firm. However, as we have found earlier in issue 1, the genesis and spirit of the succession plan and the sale agreement is not just to restrict the defendant herself to be in competition against the LLP. Instead, it extends to a restriction not to cause any competition which would hinder the full succession and hand over of the firm's clientele or in other words, cause the LLP's existing clientele to prefer any other competitor as the clients' auditing firm.

[38] Thus, we find that the defendant's personal, beneficial or financial interest within the competing firm is entirely irrelevant and unnecessary to determine whether or not the defendant was in breach of the succession plan and sale agreement. As long as the defendant had acted in any manner or capacity that would lead the LLP into competition over its existing clients, the defendant would have breached the succession plan and cl 8.1 of the sale agreement.

[39] The above considered, it is plain to see that the defendant indeed had caused the 30 companies to abandon the LLP and prefer the competing firm. The defendant strenuously attempted to argue that the 30 companies' decision were the companies' own commercial decision which was free from the defendant's influence. However, the evidence before this court proves the exact opposite.

[40] First and foremost, it was *readily admitted* by a partner of the competing firm himself ('SP4') that *it was the defendant who had introduced the 30 clients to be 'parked' in the competing firm*. It was further admitted that the competing firm had never known the 30 clients prior to the defendant's introduction to the competing firm. This was far from any genuine commercial decision from the 30 companies. It cannot be mere coincidence that the 30 clients who appointed the competing firm just happened to be the 30 clients of the LLP. In actuality the defendant had abused her position and information within the LLP to steer the LLP's clients to 'follow her' to the competing firm which was ran by her own former employees and had business relations with Pro Venture. This act of abusing the LLP's database and portfolio to 'introduce' or siphon existing clients to the competing firm is squarely a breach against the sale agreement.

[41] Secondly, it cannot be mere coincidence that the defendant had proximity in relationship with the partners of the competing firm. It also cannot be mere coincidence that Pro Venture had proximity in location and business relations with the competing firm. The factum of the defendant's influence is glaring. The burning question is simply, if indeed the 30 companies' decision was purely their commercial decision, then why was it that out of the hundreds, if not thousands of company secretary companies in Malaysia, did the 30 companies just happened to collectively appoint the competing firm introduced by the defendant? The answer must simply be that their decisions were shaped and influenced by the defendant. It is as though as the defendant had the midas touch but instead of turning the clients into gold, the clients 'touched' by the defendant would remove the plaintiff as their original auditors.

[42] The defendant was also adamant that the learned judge had failed to consider SD1 (a director of some of the companies within the 30 clients) who had testified that the companies had decided to 'follow' Judy was an independent decision free from the defendant's influence. On the contrary, it also goes against the defendant's case when SD1 explicitly testified that she had decided to cease business with the LLP because the defendant was no longer in the LLP and that she prefers to follow and refer to Judy. Then this curious question arises — why would the companies appoint the supposedly 'unrelated or unaffiliated' competing firm if SD1's intention was just to follow the defendant? The simple and revealing answer is simply that indeed the new auditors in the competing firm were affiliated with the defendant. There are simply too much compelling nexus and interrelation between the defendant and the competing firm for their correlation to be mere 'coincidence' (especially considering the fact the new auditors were the defendant's own former employees).

[43] Although the defendant is free to be appointed as any company's company secretary after her departure from the LLP, it is far too much a coincidence that the 30 companies that have appointed her as company secretary *WERE ALL THE PLAINTIFF'S CLIENTS*. Furthermore, it is infinitely more conspicuous considering the same 30 companies decided to remove the plaintiff as auditors immediately after appointing the defendant as their company secretary.

[44] Considering the myriads of compelling evidence deliberated in this part, we also answer *issue 2 in the affirmative*. The learned judge was correct in finding that the defendant indeed had breached the sale agreement for siphoning and directing the 30 clients away from the LLP and into the competing firm.

Issue 3: Whether the learned judge was correct in not drawing any adverse inference against the plaintiff for allegedly failing to call material witnesses to testify at trial

[45] We endeavour to answer this issue just for the sake of completeness. Much has been contended by the defendant regarding the veracity of the surveillance report prepared by the private investigator hired by the plaintiff. The defendant argued that the surveillance report was incomplete and self-serving on the basis that the plaintiff had failed to call material witnesses to testify on the contents of the surveillance report.

[46] The defendant's chief argument was that for the plaintiff to prove his case (and contents of the surveillance report), the directors of the 30 companies (five of which were included within the surveillance report) are material witnesses that the plaintiff had withheld from the court in fear of adverse testimony. On that notion the defendant insisted that an adverse inference under s 114(g) of the Evidence Act 1950 ought to be drawn against the plaintiff.

[47] On the contrary, considering the totality of the evidence furnished into court, it was sufficiently safe for the learned judge to make his findings even without the surveillance report. The factum that the 30 clients' introduction to the competing firm was readily admitted by the partner of the competing firm himself. Meanwhile, the factum of the defendant's sudden appointment and appearance at the EGMs to remove the plaintiff as auditor was sufficiently minuted in the minutes of meeting tendered into court. Even without the aid of the surveillance report, it is absolutely clear that the defendant had breached the succession plan and the sale agreement. Since the plaintiff's case can already be proven vide the admissions of the partner of the competing firm as well as the documentary evidence (as in the minutes of the EGM), no adverse inference should be drawn against the plaintiff for not calling the directors to

testify at trial. The eventual appointment of the defendant as the 30 clients' company secretary and the defendant's attendance at the 30 clients' EGMs to remove the plaintiff are evidence enough of the defendant's continued improper communications with the LLP's clients in an attempt to exert her influence upon the 30 companies.

[48] This principle was very recently restated in *TM Global Marine Sdn Bhd (formerly known as Smart Work Co-Ordinating Sdn Bhd) v Thermatek Sdn Bhd* [2022] 9 MLJ 641 (which was later affirmed by the Court of Appeal):

> [121] I thus agree with the submission of the plaintiff that the plaintiff's case can be satisfactorily proved on contemporary documents adduced in court as what needed to be produced and proved to discharge its burden of proof could, and was done through Capt Malim and available documents. See *Sarkar Law of Evidence* (2nd Malaysian Ed) at p 3129:
>
> > In the circumstance whereby, the *fact in issue can be decided based on the documentary evidence presented before the court, there is no necessity to draw an adverse inference against a party for failing to call a witness* to court to give oral evidence in support ... (Emphasis added.)

[49] On the contrary, an adverse inference can be drawn against the defendant herself. If the defendant was truly genuine in her assertion that the 30 companies were not influenced by her, then it is equally incumbent of the defendant to adduce evidence (and call witnesses) to prove that none of these clients were under her influence. The plaintiff has successfully adduced numerous evidence which is indicative of the defendant's influence persuading the 30 companies to cease the plaintiff's services. The plaintiff had fulfilled his legal burden under s 101 of the Evidence Act 1950 as well as evidential burden of proof under ss 102 and 103 of the Evidence Act 1950. Thereto, the onus of proof (evidential burden) shall shift onto the defendant to disprove the plaintiff's assertion and set of evidence. We refer to the salutary words of the Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697:

> There is an essential distinction between burden of proof and onus of proof, burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The 'burden of proof' in s 101 is the burden to establish a case which rests throughout on the party who asserts the affirmative of the issue ... In some jurisdictions, the s 101 'burden of proof' is labelled 'legal burden' while the s 102 burden of proof' is referred to as 'evidential burden' ... In *Ranchhodbhai Somabhai And Anr v Babubhai Bhailalbhai And Ors* AIR 1982 Guj 308, P Desai and S Majmudar thus illustrated the 'burden of proof to establish the case which never shifts'.

[50] Thus, considering that the onus of proof has already shifted onto the defendant, the failure to call these material witnesses falls onto the defendant herself. If there shall be any adverse inference to be drawn, it should have been drawn against the defendant, and not at all the plaintiff.

[51] Thus, we answer *issue 3 in the affirmative*. The learned judge was correct in not drawing any adverse inference against the plaintiff for allegedly failing to call material witnesses to testify at trial.

Issue 4: Whether the learned judge was correct in using the LLP's fees as a gauge or measure to quantify the proper quantum of damages for the defendant's breach

[52] Our answers in issues 1, 2, and 3 entails that the learned judge's finding as to liability was sound in law and ought not be disturbed. Nevertheless, we are pressed to address the manner and method the learned judge quantified the proper quantum of damages to compensate the plaintiff.

[53] We are aware that one of the other points raised by the defendant was on the locus standi of the plaintiff to claim on behalf of the LLP. Indeed, we are made aware that the LLP was not a party in the plaintiff's main suit, but was only a party in the defendant's counterclaim (for alleged defamation and breach of confidentiality). LLP being an artificial entity under the Limited Liability Partnerships Act 2012 is afforded a similar effect of incorporation alike a company in that a LLP becomes a separate entity than that of the partners. Thus, in case of any loss or damages inflicted upon a LLP, the proper party to sue for reparation of that loss or damages would be that LLP itself and not any of the partners. This is in line with s 3 of the Limited Liability Partnerships Act 2012 which reads as follows:

> 3 Separate legal personality and capacity
>
> (1) A limited liability partnership is a body corporate and shall have legal personality separate from that of its partners.
>
> (2) A limited liability partnership shall have perpetual succession.
>
> (3) Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.
>
> (4) A limited liability partnership shall have unlimited capacity and shall be capable of —
>
> (a) suing and being sued;
>
> (b) acquiring, owning, holding and developing or disposing of property; and
>
> (c) doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.

[54] Nonetheless, we must highlight that the issue on the LLP's losses is not at all an issue of locus standi. This is simply because the plaintiff's case is based on the breach of the succession plan and the sale agreement which is privy only to the plaintiff and the defendant (and not the LLP). The LLP cannot sue on the sale agreement or the succession plan. Thus, the plaintiff remains the proper plaintiff in the present appeal.

[55] However, the learned judge still partially fell into error to simply equate the quantum of the plaintiff's loss to the LLP's loss of fees upon losing the 30 clients.

[56] Even if the fees payable to the LLP be made a yardstick to measure damages, the learned judge had failed to consider that partnership income or revenue does not necessarily translate to partnership profit. The gross income or revenue of the LLP must surely be deducted with a reasonable and foreseeable amount of operational expenses before a final net profit amount can trickle down into the partnership's profit.

[57] Thus, in the present appeal, the reference as to the fees that might have been earned by the LLP if not for the defendant's breach, was merely made to ascertain a reasonable quantum of damages to be awarded due to the defendant's breach. The High Court can only do its best (when there is no viable measure of damages applicable) to ascertain a fair and just compensation for the breach occasioned by the defendant against the plaintiff. And if a definitive manner and method of calculation was not available, it is open for the court to consider relevant facts and evidence in a case to come as close as the court can to a fair and just amount of compensation.

[58] As we found earlier, the income of the LLP might not necessarily translate into the net profits to trickle down to the LLP's partners. Thus, although we maintain the learned judge's findings on liability, we have to partially allow the present appeal specific and limited to the issue of quantum of damages. This is mainly because there was no evidence adduced which would assist the court to ascertain the expenses incurred and deductibles in the operation of the LLP in order to ascertain the profits. In this circumstance, we have the discretion to partially allow the appeal for the matter to be remitted back to the High Court specific and limited to assessment of damages to ascertain the proper quantum of damages in the form of the plaintiff's profits instead of the LLP's overall income or revenue. We found great guidance in the *Federal Court* decision in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 which had held the following:

> Therefore, contrary to the respondent's submission, *we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words pendapatan and*

A *kutipan, which shed no light on the actual loss of profits*. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce the collections, and corresponding commissions, be it a significant reduction in remaining arrears or for
B any other reason …

… *We order that this claim be remitted to the High Court for assessment of damages, by a High Court judge on the issue of quantum occasioned by wrongful termination of the contract.* (Emphasis added.)

C **[59]** The above deliberations considered under this part, we answer *issue 4 in the negative*. The learned judge had erred in using the LLP's fees as a gauge or measure to quantify the proper quantum of damages for the defendant's breach. Thus, specific and limited to the quantum of damages (without
D disturbing the learned judge's finding of liability) we order this matter to be remitted back to the High Court *specifically only for assessment of damages to ascertain a clearer measure of loss of profits arising out of the defendant's breach of contract*.

E *Issue 5: Whether the learned judge was correct in dismissing the defendant's counterclaim against the plaintiff*

[60] This court observes that in addition to refuting the plaintiff's claim for damages for breach of contract, the defendant had also counterclaimed against
F the plaintiff for damages for defamation and breach of confidentiality. In this regard, as we have agreed on the learned judge's findings on liability, therefore is naturally follows that the appellant's complaints in her counterclaim (for defamation and breach of confidentiality) shall fail resoundingly. Notwithstanding whether or not the respondent's statements were defamatory
G or not, there is no reason for us to delve deeply into the appellant's allegations here as all of the respondent's statements regarding the appellant's blatant breach of contract, and siphoning of the respondent's 30 clients are legally justifiable as the statements were actually the truth of the matter.

H **[61]** It is also thoroughly inequitable for the appellant to allege any breach of confidentiality against the respondent considering the appellant herself had her hands tainted by her own breaches against the sale agreement by her own abuse of the firm's internal information, portfolio, and database. The appellant had
I not come with clean hands and we certainly would not lend a hand to such hypocrisy. Therefore, there are no merits whatsoever in the appellant's appeal against the learned judge's dismissal of the appellant's counterclaim. The learned judge's dismissal of the appellant's counterclaim is hereby maintained. As a result, the obvious answer to *issue 5 must be in the positive*.

OUR DECISION

[62] We appropriately divide our decision into three parts. The first being our decision on liability, second being our decision on quantum and thirdly, on the dismissal of the defendant's counterclaim.

[63] Firstly, on the learned judge's finding on liability, considering all of the above deliberations and our answers in issues 1, 2, and 3, we find that there are no merits in the present appeal against liability. Thus, we dismiss the present appeal against the learned judge's finding on liability. Therefore, the learned judge's decision, findings, and orders on liability are hereby affirmed and maintained.

[64] Secondly, on the learned judge's finding on quantum of damages, considering all of the above deliberations and answer in issue 4, we find that there are merits in the present appeal against quantum. Thus, we partially allow the present appeal against the learned judge's finding on quantum. Therefore, we accordingly order that this matter to be remitted back to the High Court *specifically and limited only for assessment of damages to ascertain a clearer measure of loss of profits (instead of the LLP's overall loss of income or revenue) arising out of the defendant's breach of contract.*

[65] Thirdly, the learned judge's decision in dismissing the counterclaim mounted by the defendant against the plaintiff is upheld as there is no appealable error on that part of the learned judge's decision.

[66] Lastly, in view of the above considerations, we also order that the appellant-defendant is to pay costs of RM15,000 to the respondent-plaintiff here and below, subject to allocator.

Appeal dismissed.

Reported by Ashok Kumar